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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 613

STATE OF MISSOURI, ex rel. STATE HIGHWAY COMMISSION OF MISSOURI,
Appellee,

vs.

ELWYN LOOMIS CADY and ANNABEL CADY,
Appellants.

ON APPEAL FROM THE KANSAS CITY COURT OF APPEALS OF MISSOURI

APPELLEE'S MOTION TO DISMISS APPEAL
and
BRIEF IN SUPPORT THEREOF

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APPELLEE'S MOTION TO DISMISS APPEAL

Comes now Appellee, State of Missouri at the relation of the State Highway Commission of Missouri, by its attorneys, Robert L. Hyder and Bruce A. Ring, and moves the Court to dismiss the appeal taken by Appellants from the Kansas City Court of Appeals of Missouri on the grounds that the appeal does not present a substantial federal question.

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Counsel for Appellee.

APPELLEE'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

HISTORY OF CASE

The State of Missouri at the relation of the State Highway Commission of Missouri instituted proceedings in the Circuit Court of Livingston County, Missouri, to acquire certain interests in lands owned by Appellants herein for the construction and maintenance of a state highway. These proceedings were instituted pursuant to Chapter 523, RSMo 1959. Prior to the date set for the appointment of three commissioners to view the property involved and assess the Appellants' damages, Appellants filed an answer in the Circuit Court of Livingston County. On the date set for the appointment of commissioners the Circuit Court of Livingston County entered its order appointing three commissioners who were resident freeholders of Livingston County to view Appellants' property and determine the damages resulting thereto from the appropriation. Thereafter, the commissioners so appointed filed their report with the Circuit Court of Livingston County, by which report they assessed no damages in favor of Appellants. Thereafter, Appellants filed their motion for new trial, which motion was overruled by the Circuit Court of Livingston County. At the same time that Appellants filed their motion for new trial they also filed pursuant to Section 523.050, RSMo 1959, exceptions to the report of commissioners, requesting a new appraisement of their damages by a jury. Thereafter, Appellants appealed to the Supreme Court of Missouri. The Supreme Court of Missouri dismissed Appellants' appeal for the reason that it had been taken prematurely in that no final judgment had been entered in the cause. By its order, the Supreme Court of Missouri dismissed the appeal without prejudice

to Appellants' right to proceed on the trial of their exceptions to the commissioners' award. Thereafter, a jury trial was commenced in the Circuit Court of Livingston County. At the trial Appellants' only offer of evidence was that a tract of land in the area involved had sold for the sum of $2,100. Upon motion of Appellee the Court directed the jury to render a verdict in favor of Appellee, awarding no damages to Appellants. Thereafter, Appellants filed a motion for new trial in the Circuit Court of Livingston County, which was sustained, and Appellee then appealed to the Kansas City Court of Appeals of Missouri. After argument in the Kansas City Court of Appeals that court rendered its decision affirming the order granting a new trial previously entered by the Circuit Court of Livingston County, primarily on two grounds. The first ground was that there had been no proof of the jurisdictional matters raised by Appellants' answer prior to the appointment of commissioners. The second ground was that the Circuit Court improperly directed a verdict in favor of Appellee. The cause was thereupon remanded to the Circuit Court for further proceedings. (The foregoing facts are set out in State of Missouri, ex rel. State Highway Commission of Missouri, Plaintiff-Appellant, versus Elwyn Loomis Cady, Annabel Cady, Defendants-Respondents, Number 23773, decided by the Kansas City Court of Appeals of Missouri, reported at 372 S.W.2d 639, and contained in Appendix A, pages A-6 through A-11 of Appellants' Jurisdictional Statement and by the Order of the Supreme Court of Missouri, entered October 4, 1961, contained in Appendix A at page A-12 of Appellants' Jurisdictional Statement.)

Thereafter, the Circuit Court of Livingston County received evidence as to the jurisdictional matters raised by Appellants' answer and found in favor of Appellee and appointed three commissioners to assess Appellants' dam-

ages. Thereafter, these commissioners assessed damages in favor of Appellants in the amount of $100, to which award Appellants filed exceptions. A jury trial was had on Appellants' exceptions in the Circuit Court of Livingston County. At the trial Appellants' only evidence was that a one-acre tract of land with a building located thereon in the area of Appellants' property had sold for $2,800 and Appellee presented evidence of two witnesses that special benefits resulting from the highway improvement exceeded any damage resulting to the property from the appropriation. After the trial the jury deliberated and arrived at a verdict in favor of Appellants and against Appellee and awarded to Appellants damages in the amount of $150. Judgment for that amount was entered. Thereafter, Appellants filed their motion for new trial in the Circuit Court of Livingston County, which was overruled. Appellants then appealed to the Supreme Court of Missouri and that Court transferred the case to the Kansas City Court of Appeals for the reason that the Missouri Supreme Court was without jurisdiction to entertain the case. Thereafter argument was had in the Kansas City Court of Appeals and that Court rendered its opinion and decision affirming the judgment of the Circuit Court of Livingston County. (The above facts are contained in State of Missouri, ex rel. State Highway Commission of Missouri, Plaintiff-Respondents, versus Elwyn Loomis Cady and Annabel Cady, Defendants-Appellants, Number 24344, decided by the Kansas City Court of Appeals of Missouri, reported at 400 S.W.2d 481, which decision is also contained in Appendix A at pages A-1 through A-5 of Appellants' Jurisdictional Statement.)

STATEMENT AS TO JURISDICTION

The Constitution of the State of Missouri provides that the Department of Highways, a branch of the Executive Department, shall be under the State Highway Commission. Art. IV, Secs. 12 and 29, Constitution of Missouri, 1945. The Constitution and laws also provide that the State Highway Commission has authority to designate, locate, construct and maintain certain highways in the State of Missouri, including supplementary state highways. Art. IV, Sec. 30, Constitution of Missouri, 1945, and Sec. 227.030, RSMo 1959. The statutes further provide that the State Highway Commission may acquire lands or interests in lands in the name of the State of Missouri when necessary for the proper and economical construction of state highways. Sec. 227.120, RSMo 1959. In the event condemnation becomes necessary to acquire land or interests therein for the construction and maintenance of state highways, the State Highway Commission shall proceed under the provisions of Chapter 523, RSMo 1959. ~~Sec.~~ 227.120, RSMo 1959.

Section 523.010, RSMo 1959, provides that in the event the condemning authority and the owner of the property to be acquired cannot agree upon the proper compensation to be paid, then the condemning authority may file its petition in the Circuit Court of the County wherein the real estate is located for the purpose of condemning the necessary property or interests therein.

In the instant case Appellee followed the procedure prescribed and filed its petition in the Circuit Court of Livingston County, Missouri, that being the county in which the property involved was located. Upon the receipt of evidence in the second proceeding the Court found that the parties had been unable to agree upon proper compensation to be paid. Section 523.040, RSMo 1959, provides

that the Circuit Court after determining that due notice of pendency of the proceeding has been given to the parties shall appoint three commissioners who shall be freeholders and residents of the county in which the real estate is located. This section further provides that the commissioners shall view the property and file their written report with the Circuit Court or the Clerk thereof, setting out a description of the property and the damages awarded to the owners. That in this case was done and the second commissioners awarded to the defendants the sum of $100.

Section 523.050, RSMo 1959, provides that if either party be not satisfied with the award made by the Commissioners that party may file its written exceptions within ten days and shall be entitled to a jury trial. In the instant case upon Appellants' filing their exceptions a jury trial was had which resulted in a verdict for Appellants in the sum of $150 as damages for the taking of their property.

Section 227.120, RSMo 1959, provides that commissioners in assessing damages for the appropriation of property for highway purposes shall take into consideration the benefits resulting to the property from the construction and maintenance of the public improvement upon the property. The Supreme Court of Missouri has held that the proper measure of damages in a condemnation case is the difference between the value of the owners' entire property before the appropriation and the value of the owners' remaining property after the appropriation, *State ex rel. State Highway Commission v. Johnson,* (Mo. Sup.) 392 S.W.2d 251, and has also held that if special benefits resulting from the construction and maintenance of the public improvement are equal to or exceed the value of the property taken and any damage to the remainder, that is, if the value of the owners' property after the appropriation is as much as or greater than the value of the property

prior to the appropriation, then the property owner has been justly compensated and is not entitled to additional compensation in excess of special benefits. *State ex rel. State Highway Commission* v. *Jones,* 321 Mo. 1154, 15 S.W.2d 338. See also *State ex rel. State Highway Commission* v. *Bailey,* (Mo. App.) 115 S.W.2d 17.

This same principle of special benefits has been upheld by the Supreme Court of the United States in the cases of *Wright* v. *Davidson,* 181 U.S. 371, 45 L. Ed. 900, and *Bauman* v. *Ross,* 167 U.S. 584, 41 L. Ed. 270.

The federal statutes pertaining to condemnation have included the principle of special benefits being used to offset damages. 33 U. S. Code Annotated, Sec. 595, provides ". . . the jury . . . shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement and shall render their award or verdict accordingly." This principle was upheld in *U. S.* v. *River Rouge Impr. Co.,* 46 S. Ct. 44, 269 U.S. 411.

From the foregoing it is shown that Appellants were afforded due process of law for the taking of their property in that they were given the benefit of the Missouri procedure of determining just compensation by three disinterested freeholders and residents of the county in which the property was located, were then afforded an appeal from this determination to a jury of twelve persons and subsequent thereto were accorded an appeal to the appellate courts of the state. It is therefore evident that no constitutional guaranties of Appellants have been violated in this case and that Appellants were accorded complete opportunity to have just compensation to which they were entitled determined in a manner which is consistent with the provisions of both the Constitution of the State of Missouri and the Constitution of the United States.

We therefore respectfully submit that the appeal should be dismissed.

Respectfully submitted,

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APPENDIX A

Article IV, Constitution of Missouri, 1945

Section 12. Executive department—definition and composition—assignment of agencies to departments.—The executive department shall consist of all state elective and appointive officials and employees except the officials and employees of the legislative and judicial departments. In addition to the governor and lieutenant governor there shall be a state auditor, secretary of state, attorney general, a state treasurer and a department of revenue, department of education, department of highways, department of conservation, department of agriculture and such additional departments, not exceeding five in number, as may hereafter be established by law. Unless discontinued all present or future boards, bureaus, commissions and other agencies of the state exercising administrative or executive authority shall be assigned by the governor to the department to which their respective powers and duties are germane.

* * * * * * *

Section 29. Highway commission—qualifications of members and employees—authority over state highways.—The department of highways shall be in charge of a highway commission. The number, qualifications, compensation and terms of the members of the commission shall be fixed by law, and not more than one-half of its members shall be of the same political party. The selection and removal of all employees shall be without regard to political affiliation. It shall have authority over and power to locate, relocate, design and maintain all state highways;

and authority to construct and reconstruct state highways, subject to limitations and conditions imposed by law as to the manner and means of exercising such authority; and authority to limit access to, from and across state highways where the public interest and safety may require, subject to such limitations and conditions as may be imposed by law.

Section 30. Source and application of highway funds. —For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers, and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes) less the cost (1) of collection thereof, (2) of maintaining the commission, (3) of maintaining the highway department, (4) of any workmen's compensation, (5) of the share of the highway department in any retirement program for state employees as may be provided by law, (6) and of administering and enforcing any state motor vehicle laws or traffic regulations, shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other:

First, to the payment of the principal and interest on any outstanding state road bonds.

Second, any balance in excess of the amount necessary to meet the payment of the principal and interest of any state road bonds for the next succeeding twelve months shall be credited to the state road fund and shall be expended under the supervision and direction of the commission for the following purposes:

(1) To complete and widen or otherwise improve and maintain the state system of highways heretofore designated and laid out under existing laws;

(2) To reimburse the various counties and other political subdivisions of the state, except incorporated cities and towns, for money expended by them in the construction or acquisition of roads and bridges now or hereafter taken over by the state as permanent parts of the system of state highways, to the extent of the value to the state of such roads and bridges at the time taken over, not exceeding in any case the amount expended by such counties and subdivisions in the construction or acquisition of such roads and bridges, except that the commission may, in its discretion, repay, or agree to repay, any cash advanced by a county or subdivision to expedite state road construction or improvement;

(3) In the discretion of the commission to locate, relocate, establish, acquire, construct and maintain the following:

(a) supplementary state highways and bridges in each county of the state as hereinafter provided;

(b) state highways and bridges in, to and through state parks, public areas and reservations, and state institutions now or hereafter established, and connect the same with the state highways; and also national, state or local parkways, travelways, or tourneys, with coordinated facilities;

(c) any tunnel or interstate bridge or part thereof, where necessary to connect the state highways of this state with those of other states;

(d) any highway within the state when necessary to comply with any federal law or requirement which is or shall become a condition to the receipt of federal funds;

(e) any highway in any city or town which is found necessary as a continuation of any state or federal highway, or any connection therewith, into and through such city or town; and

(f) additional state highways, bridges and tunnels, outside the corporate limits of cities having a population in excess of 150,000, either in the congested traffic areas of the state or where needed to facilitate and expedite the movement of through traffic.

(4) To acquire materials, equipment and buildings necessary for the purposes herein described; and

(5) For such other purposes and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the commission may deem necessary and proper.

* * * * * *

Revised Statutes of Missouri 1959

(References are to official statutes of Missouri—the subject is contained in Vernon's Annotated Missouri Statutes by sections corresponding with the official statutes.)

227.030. Construction and maintenance of highway system under supervision and control of commission.—1. The construction and maintenance of said highway system and all work incidental thereto shall be under the general supervision and control of the state highway commission, which is hereby authorized, empowered and directed to take whatever steps may be necessary to cause said state highway system to be constructed at the earliest possible time, consistent with good business management and funds available, after this chapter takes effect, and also to provide for the proper maintenance of said state highway system.

2. The state highway commission shall have power to make all final decisions affecting the work provided for herein and all rules and regulations it may deem necessary not inconsistent with this chapter for the proper management and conduct of said work and for carrying out all of the provisions of this chapter in such manner as shall be to the best interest and advantage of the people of the state.

3. The commission is hereby given power and authority to purchase, lease, or otherwise acquire and supply any tools, machinery, supplies, material and labor needed for said work and to pay for engineering, preparation of plans and specifications, cost of advertising, engineering supervision and inspection, and all expenses and contingencies in connection with the construction and maintenance of such state highway system.

(1) Acquiring the right of way for the location, construction, reconstruction, widening, improvement or maintenance of any state highway or any part thereof;

(2) Acquiring bridges or sites therefor and ferries, including the rights and franchises for the maintenance and operation thereof, over navigable streams, at such places as the state highway commission shall have authority to construct, acquire or contribute to the cost of construction of any bridge;

(3) Acquiring the right of way for the location, construction, reconstruction, widening, improvement or maintenance of any highway ordered built by the bureau of public roads of the Department of Agriculture of the United States government;

(4) Obtaining road building or road maintenance materials or plants for the manufacture or production of such materials and acquiring the right of way thereto; also

acquiring the right of way to such plants as are privately owned when necessary for the proper and economical construction of the state highway system;

(5) Changing gradients in any state highway;

(6) Establishing detours in connection with the location, construction, reconstruction, widening, improvement or maintenance of any state highway or any part thereof;

(7) Changing the channels of any stream and providing for drainage ditches when necessary for the proper construction or maintenance of any state highway;

(8) Eliminating grade crossings;

(9) Acquiring water supply and water power sites and necessary lands for use in connection therewith, including right of ways to any such sites;

(10) Acquiring sites for garages and division offices and for storing materials, machinery and supplies;

(11) Acquiring lands for sight distances along any state highway or any portion thereof whenever necessary, and also acquiring lands within wyes formed by junctions of state highways, or junctions of state highways and other public highways;

(12) Acquiring lands or interests therein for the purpose of depositing thereon excess excavated, or other materials produced in the construction, reconstruction, widening, improvement or maintenance of any state highway;

(13) Acquiring lands for any other purpose necessary for the proper and economical construction of the state highway system for which the commission may have authority granted by law. If condemnation becomes necessary, the commission shall have the power to proceed to

condemn such lands in the name of the state of Missouri, in accordance with the provisions of chapter 523, RSMo, insofar as the same is applicable to the said state highway commission, and the court or jury shall take into consideration the benefits to be derived by the owner, as well as the damage sustained thereby. The state highway commission also shall have the same authority to enter upon private lands to survey and determine the most advantageous route of any state highway as granted, under section 388.210, RSMo, to railroad corporations.

* * * * * * *

523.010. Lands may be condemned, when—petition—parties.—1. In case land, or other property is sought to be appropriated by any road, railroad, street railway, telephone, telegraph or any electrical corporation organized for the manufacture or transmission of electric current for light, heat or power, including the construction (when that is the case) of necessary dams and appurtenant canals, flumes, tunnels and tailraces and including the erection (when that is the case) of necessary electric steam powerhouses, hydroelectric powerhouses and electric substations or any oil, pipe line or gas corporation engaged in the business of transporting or carrying oil or gas by means of pipes or pipe lines laid underneath the surface of the ground, or other corporation created under the laws of this state for public use, and such corporation and the owners cannot agree upon the proper compensation to be paid, or in the case the owner is incapable of contracting, be unknown, or be a nonresident of the state, such corporation may apply to the circuit court of the county of this state where said land or any part thereof lies, or the judge thereof in vacation, by petition setting forth the general directions in which it is desired to construct their road, railroad, street railway, telephone, or telegraph line or electric line, including (when that is the case) the con-

struction and maintenance of necessary dams and appurtenant canals, tunnels, flumes and tailraces and when that is the case the appropriation of land submerged by the construction of said dam, and including the erection and maintenance (when that is the case) of necessary electric steam powerhouses, hydroelectric powerhouses and electric substations, or oil, pipe line or gas line over or underneath the surface of such lands, a description of the real estate or other property, which the company seeks to acquire; the names of the owners thereof, if known or if unknown; a pertinent description of the property whose owners are unknown and praying the appointment of three disinterested freeholders, as commissioners, or a jury, to assess the damages which such owners may severally sustain in consequence of the establishment, erection and maintenance of such road, railroad, street railway, telephone, telegraph line, or electrical line including damages from the construction and maintenance of necessary dams and the condemnation of land submerged thereby, and the construction and maintenance of appurtenant canals, flumes, tunnels and tailraces and the erection and maintenance of necessary electric steam powerhouses, hydroelectric powerhouses and electric substations, or oil, pipe line or gas line over or underneath the surface of such lands; to which petition the owners of any or all as the plaintiff may elect of such parcels as lie within the county or circuit may be made parties defendant by names if the names are known, and by the description of the unknown owners of the land therein described if their names are unknown.

2. If the proceedings seek to affect the lands of persons under guardianship, the guardians must be made parties defendant; if the land of married women, their husbands must be made parties defendant. If the present owner of any land to be affected has less estate than a fee the person having the next vested estate in remainder may

at the option of the petitioners be made party defendant; but if such remaindermen are not made parties their interest shall not be bound by the proceedings.

3. It shall not be necessary to make any persons party defendants in respect to their ownership unless they are either in actual possession of the premises to be affected claiming title or having a title of the premises appearing of record upon the proper records of the county.

* * * * * *

523.040. Appointment of commissioners—their duties. —The court, or judge thereof in vacation, on being satisfied that due notice of the pendency of the petition has been given, shall appoint three disinterested commissioners, who shall be freeholders, resident of the county in which the real estate or a part thereof is situated, to assess the damages which the owners may severally sustain by reason of such appropriation, who, after having viewed the property, shall forthwith return to the clerk of such court, under oath, their report in duplicate, of such assessment of damages, setting forth the amount of damages allowed to the person or persons named as owning or claiming the tract of land condemned, and should more than one tract be condemned in the petition, then the damages allowed to the owner, owners, claimant or claimants of each tract, respectively, shall be stated separately, together with a specific description of the tracts for which such damages are assessed; and the clerk shall file one copy of said report in his office and record the same in the order book of the court, and he shall deliver the other copy, duly certified by him, to the recorder of deeds of the county where the land lies (or to the recorder of deeds of the city of St. Louis, if the land lies in said city) who shall record the same in his office, and index each tract separately as provided in section 59.440, RSMo, and the

fee for so recording shall be taxed by the clerk as costs in the proceedings; and thereupon such company shall pay to the said clerk the amount thus assessed for the party in whose favor such damages have been assessed; and on making such payment it shall be lawful for such company to hold the interest in the property so appropriated for the uses aforesaid; and upon failure to pay the assessment, aforesaid, the court may, upon motion and notice by the party entitled to such damages, enforce the payment of the same by execution, unless the said company shall, within ten days from the return of such assessment, elect to abandon the proposed appropriation of any parcel of land, by an instrument in writing to that effect, to be filed with the clerk of said court, and entered on the minutes of the court, and as to so much as is thus abandoned, the assessment of damages shall be void.

* * * * * *

523.050. Commissioners' report—notice of filing—review.—1. Upon the filing of such report of said commissioners, the clerk of the court wherein the same is filed shall duly notify the party whose property is affected of the filing thereof; and the report of said commissioners may be reviewed by the court in which the proceedings are had, on written exceptions, filed by either party in the clerk's office, within ten days after the service of the notice aforesaid; and the court shall make such order therein as right and justice may require, and may order a new appraisement, upon good cause shown.

2. Such new appraisement shall, at the request of either party, be made by a jury, under the supervision of the court, as in ordinary cases of inquiry of damages; but notwithstanding such exceptions, such company may proceed to erect said telephone or telegraph line, or con-

struct said road or railroad; and any subsequent proceedings shall only affect the amount of compensation to be allowed. In all cases arising under the provisions of this chapter, the report of commissioners, when signed by a majority of them, shall be taken and considered as the report of all.